(27,168)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 413.

THE UNITED STATES OF AMERICA AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

a Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

b Filed Dec. 5, 1918.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Petition and Order for Writ of Mandamus.

Samuel Untermyer, Frank M. Swacker, Attorneys for Relator, Wilkins Building, Washington, D. C.

1 Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Petition for Writ of Mandamus.

To the Supreme Court of the District of Columbia:

Comes now Kansas City Southern Railway Company and respectfully shows to this Court:

First. That it is a corporation common carrier engaged in the transportation of persons and property by railroad between places in various States of the United States, and so subject to the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," etc., and acts supplemental thereto and amendatory thereof, including the Act of March 1, 1913 (38 U. S. Statutes at Large, page 701), commonly known as the Valuation Act, which Act, among other things, provides as follows:

2 "Sec. 19*a*. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in
3 excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed."

Second. That heretofore and in or about the year 1914 the respondent, Interstate Commerce Commission, pursuant to the provisions of said Act of March 1, 1913, embarked upon an investigation to ascertain the value of the property of the relator as of June 30, 1914, which investigation continued from time to time until the 15th day of November, 1918, and involved the taking of many thousands of pages of testimony; involving an expense of over $250,000 to the relator, besides the very large sum expended by respondent.

Third. That during the course of said investigation by respondent of relator's property, in May, 1917, respondent and relator entered into stipulations concerning said investigation, containing, among others, the following provisions:

"Stipulation.

The following is a copy of the stipulation entered into between the representatives of the Carrier and of the Bureau of Valuation with respect to certain matters put in issue by the Carrier's Protest to the Tentative Valuation:

Stipulations.

The following agreement is entered into between the Division of Valuation of the Interstate Commerce Commission (subject
4 to the approval of the Commission) and The Kansas City Southern Railway Company and subsidiary companies named in the protest filed by them herein (all hereinafter referred to as the 'Carrier'), and the same shall be filed as a part of the record herein without prejudice to the right of either party to supplement same by the introduction of testimony as to any matter not finally disposed of herein.

It is further agreed that in the event the Commission shall disapprove the action of the Bureau of Valuation in any particular matter, then insofar the Carrier shall be absolved from the obligation devolving upon it; and further, that this stipulation is made wholly without prejudice to any right which the Carrier may have under the law to obtain a judicial review of the determination which the Commission shall make in the premises, either with respect to question of law or of fact, save such facts as are expressly admitted.

* * * * * * *

Lands.

1. Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods; first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not
5 to be resorted to if the second method can be made available.

It is therefore understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and to introduce testimony in modification of the same which it has as to any other fact stated in the Tentative Valuation.

If, in the opinion of the Commission, it transpires, at any stage of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

Fourth. That during the time the respondent was engaged in its investigation of relator's property, it was also engaged in an investigation to ascertain the value of the property of the Texas Midland Railroad Company, which investigation it completed December 14, 1917, and on July 31, 1918, rendered its decision, report and findings, which are set forth in Valuation Reports of the Interstate Commerce Commission No. 1, at page 1, and here referred to as though set out in full. As appears by reference to said report (page
6 52 to 62, inclusive, a copy of which is hereto annexed as Exhibit A hereof), the respondent, notwithstanding the express direction contained in the paragraph nominated second of Section 19*a* of said Act of March 1, 1913, above set forth, refused and declined to find and report with respect to lands owned and used by said Texas Midland Railroad Company the then "present cost of condemnation and damages or of purchase in excess of such original cost or present value," basing its said refusal upon respondent's inter-

pretation of the decision of the Supreme Court of the United States in the Minnesota Rate Case, 230 U. S. 352.

Fifth. That after respondent had reached the conclusions set forth in said Texas Midland Railroad Company valuation above mentioned upon August 29, 1918, it notified the relator that it would not adopt the plan of determining the present cost of condemnation and damages or purchase set forth in the stipulation above mentioned, and in conformity with the other provisions thereof assigned the subject for hearing and the introduction of proofs before an examiner of respondent at Kansas City, Missouri, September 9, 1918. That thereupon relator commenced the preparation of evidence with respect to such present cost of condemnation and damages or purchase with respect to each parcel of land owned or used by it, and on September 9, 1918, proffered evidence thereof, the admissibility of which, in view of said Texas Midland decision, was questioned by counsel for respondent and thereupon excluded by said examiner of respondent.

Sixth. That on October 1, 1918, relator filed its motion
7 with respondent to overrule said examiner and take such evidence so offered by relator in accordance with the provisions of said Act of March 1, 1913, and on October 4, 1918, respondent made its order directing that said matter be re-opened for the taking of testimony and assigned the same for hearing before one of its examiners upon October 7, 1918. That said examiner, on said date, proceeded to take and receive testimony and evidence upon said subject, and relator produced evidence thereon respecting so much of its lands as are located in Kansas City and Jackson County, Missouri, and relator sought and offered to introduce testimony and evidence in relation to the remainder of its line of railway, some 700 miles or more in length, but said examiner, acting upon the direction of respondent, declined and refused to receive such evidence; and respondent directed that the hearing upon the valuation of relator's property be thereupon closed and the entire matter of the valuation of relator's property set for argument before respondent October 17, 1918.

Seventh. That on October 17, 1918, the relator renewed its application before respondent to be allowed to make proof concerning such present cost of condemnation and damages or purchase with respect to the remainder of its line, and counsel for relator accompanied said motion with an affidavit setting forth the facts and circumstances in relation to said matter, a copy of which is hereto attached and marked Exhibit B, but respondent, declining then to rule upon said motion, required counsel for relator to proceed with final arguments upon the whole valuation of relator's property. Counsel for relator renewed

said motion in the course of said argument and again at
8 the conclusion of said final argument, and subsequent thereto, on November 15, 1918, was advised by respondent that at its session on that date it had adopted a resolution in words as follows:

"Voted that, for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and dam-

ages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative."

Eighth. That respondent has concluded its investigation with respect to relator's property without complying with the requirement above set forth, of said Act of March 1, 1913, with respect to present cost of condemnation and damages or of purchase in excess of original cost or present value, which requirement respondent has definitely informed relator it does not intend to comply with for the reasons above stated, and it is now considering and preparing and will make its report upon relator's property without making such finding.

Ninth. That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by condemnation during four years immediately preceding said valuation at an actual cost to relator of $180,000; and in the aggregate will result
9 in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found. Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Te as Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it.

Tenth. That as said Act of Congress makes no provision for a review of the proceedings and findings of respondent with respect to its valuations, the relator is without a complete and adequate remedy for the great injury it will suffer by reason of the denial by respondent of the rights accorded it by said Act of Congress, and the injury which will result from respondent's proposed incomplete finding; and the relator will suffer great damage and injury as a result of said proposed course unless this Court, by issuing its writ of mandamus, directs respondent to comply with the requirements of said Act.

Eleventh. That no other or previous application for the relief prayed for herein has heretofore been made to any Court or Judge.

Wherefore, relator prays for an order herein directing that a peremptory writ of mandamus go to the respondent directing and requiring it to investigate, take and receive testimony, including such competent proof as relator may offer, in accordance with the provisions of said Act of March 1, 1913, upon, and ascertain, find
10 and report in detail, the present cost of condemnation and damages or of purchase in excess of original cost or present value of lands owned or used by relator: or, if the Court be not minded to issue its peremptory writ, then that its order issue directing that an alternative writ of mandamus go, commanding the re-

spondent to perform the aforesaid acts or to show cause why a peremptory writ of mandamus to that effect should not go.

And that the relator have such other or further order or relief as to the Court may seem just and proper.

And as in duty bound the relator will ever pray.

Dated, New York, December 3, 1918.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
By G. C. HAND, *Secretary.*

SAMUEL UNTERMYER,
FRANK M. SWACKER,
Attorneys for Relator, Wilkins Building, Washington, D. C.

STATE OF NEW YORK,
County of New York, ss:

G. C. Hand, being duly sworn, deposes and says:

I am Secretary of the Kansas City Southern Railway Company, and executed and subscribed the foregoing petition on its behalf.

I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me this 3rd day of December, 1918.
[SEAL.] RAPHAEL BRILL,
Notary Public, No. 250, New York County.

11 EXHIBIT A.

Valuation Reports of the Interstate Commerce Commission.

Valuation Docket No. 2.

Texas Midland Railroad.

Submitted December 14, 1917. Decided July 31, 1918.

Report of the Commission.

* * * * * * *

Lands.

The protest raises two questions, which in fact are one: (1) Shall the Commission ascertain and report the reproduction cost of carrier lands, and (2) shall the Commission ascertain and report the present cost of condemnation and damages or of purchase of the carrier's lands? Together these questions present the issue as to the duty of the Commission to report the reproduction cost of lands.

What is meant by present value, as the term is used in the tentative valuation, is thus defined by the director of valuation:

"Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use. Nothing is included for the expense of ac-
12 quisition, nor for severance damages, nor for interest during construction."

The second paragraph in the act, entitled "First," is general in terms, and directs the Commission to ascertain and report in detail as to each piece of property owned or used by the common carrier under investigation for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reasons for their differences, if any. There is no substantial question raised by the protest as to the reporting of original cost to date of lands. The essential question is with respect to the reporting of the cost of reproduction new.

The paragraph of the act entitled "Second" requires:

"Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

The paragraph entitled "Third" relates to property held for purposes other than those of a common carrier; and such investigation and report is required to show separately such property and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

13 The sixth paragraph, entitled "Fifth," relates in part to land grants, which are not here involved. The paragraph also provides:

"The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the government of the United States or by any state, county, or municipal government, or by individuals, associations, or corporations."

It was suggested upon argument that the paragraph entitled "Second" could apply only to properties as to which there had been an original cost, and that lands which cost the carrier or its predecessors nothing were governed by the paragraph entitled "Fifth." It was urged that lands which cost the carrier nothing were to be excluded from the direction in paragraph "Second" as to the ascertainment of the original and present cost of condemnation and damages or of purchase in excess of such original cost and present

value. Unless the present cost of condemnation and damages or of purchase is to be reported, which is not contemplated by the tentative report, it is unnecessary to construe these two paragraphs with respect to this contention. Applying familiar rules of statutory construction, the fact that lands, rights of way, and terminals are given specific detailed treatment in paragraphs "Second" and "Fifth" of the act points out that the latter specific requirements are to be followed rather than the preceding general language.

However, the direction in paragraph entitled "Second" for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of re-
14 production of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again it is to be taken as not existent. It seems sophistry to contend that lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay sums in excess of the value of the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights. It was testified that inquiry had shown that a relationship could be found in particular cases between the sums which the carrier must pay and present or market value of a like area of similar contiguous property; and it was claimed that such sum could be estimated in advance of construction within a few per cent of the amount which would actually be required. There is also testimony that certain state commissions, in attempting to determine the cost of reproduction of railroad lands, had made use of multiples of the value of adjacent, similar land for this purpose.

But it will be observed that in each of these cases, other
15 than the state commission valuations, the testimony before us related to the actual production of a railroad where no railroad had been before; and in none of these cases did the facts exist which necessarily must be assumed for a rational conception of the process of reproduction. That there is a marked difference between assuming in advance the total cost of acquisition whether as the result of condemnation and damages paid or of purchase, in excess of the present value of similar lands in the vicinity, when no railroad has been constructed or is in operation, and the attempt to ascertain and state the cost of reproducing or reacquiring, at the present time lands which actually have been severed from the adjacent property, have been converted into a railroad, and are being occupied by an operating rail carrier, seems clear.

We are unable to differentiate the character of testimony before

us from that which was before the Supreme Court in the Minnesota Rate Cases, supra. That decision, rendered June 9, 1913, slightly over three months after the enactment of the act, was the climax of a long series of attempts made by various state commissions and courts to apply the cost of reproduction theory to railroad lands.

The Supreme Court pointed out the nature of the assumptions which must be made in the endeavor to apply the cost-of-production theory to lands. In those cases was involved the estimate of the value of the property of the railroad within the state of Minnesota as a necessary factor in determining whether the legislative-made rates at issue were confiscatory. The question presented, said the Court, was as to the soundness of the underlying estimate of
16 value, and whether it might be accepted as a basis for a finding that the rates were confiscatory.

In the master's report was an item for "lands for right-of-way, yards, and terminals, $21,024,562," which did not include any improvements. This value was arrived at by adding 5 per cent to the appraisement of the terminal properties "for the cost of acquisition and consequential damage," and 25 per cent was added in the case of the Duluth terminals for railway value, cost of acquisition, and consequential damages. The manner in which the base figure was deduced is afterwards stated herein. There was a protest by the state authorities against the sum so reported, and the court thus summarizes the basis for the protest:

"It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of 'cost of reproduction'; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right-of-way, yards and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state and the location, population, and activities of town, villages, and cities, were as they now are." (P. 444.)

The method pursued in ascertaining the base figures is thus stated by the Supreme Court:

"(*a*) Lands outside terminals.—The complainants' witness was Mr. Cooper, the land commissioner of the company, who has charge of the land grants for its entire system, of its right-of-way and
17 land purchases, and has had a wide experience in connection with land values along the lines of railway. In the latter part of 1906, the state notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column, of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the state, he set down under the heading of 'market value,' not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This

included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right-of-way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the 'market value' as stated (in the case of agricultural lands generally multiplying it by three) and thus reached the amount set down as the 'value for railway purposes.'" (P. 445.)

Local real estate experts were employed to appraise the terminal properties at St. Paul, Minneapolis and Duluth. They were instructed "to make a conservative report of the cost of reproducing the properties owned by the company in each of their respective cities." Mr. Cooper, after discussing with these experts the estimates made by them, employed his own knowledge and formed his own judg-
18 ment, which he reported to the state under the heading of "market value." His estimate of market value was "what it would cost the company to purchase these lands, exclusive of improvements that might be made upon them, severance and consequential damages and expenses incident to acquisition." The master adopted the Cooper figures without change as to the St. Paul and Minneapolis terminals, and added 5 per cent to cover the cost of acquisition and consequential damages. As the Duluth appraisement seemed to have been based upon the ordinary value of real estate, and not on as liberal a basis as that at the twin cities, the master added 25 per cent for "railway value cost of acquisition and consequential damages."

"In reviewing the findings, the court below reached the conclusion that 'the master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value.'"

"From our examination of the evidence we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin—that the amount thus allowed in item 1 for lands, yards, and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent was allowed in item 30 for 'engineering, superintendence, legal expenses,' and again was included in the total on which 5 per cent was allowed in item
19 37 for 'contingencies,' and, in addition, was included in the total on which 10 per cent was allowed in item 39 for 'interest during construction.'" (P. 450.)

The fundamental objections to the application of the theory of reproduction to railway lands are thus stated by the court:

"These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded." (Pp. 450-451.)

The manner in which the "railway value" was found has
20 been stated. It was based on a consideration of the market value in the usual acceptance of the word, to which was added what it was estimated it would cost the railroad to acquire the land, and the sum was multiplied by three, in the case of agricultural lands, so as to cover improvements which might be on the land and the consequential and severance damages, and the cost of acquisition. Then the court states the usual rules of damages upon condemnation of lands:

"* * * supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its fair market value for all its available uses and purposes. * * * If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. * * * But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. * * * The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership * * * There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained." (Pp. 451-452.)

The court then points out what must be assumed in an attempt to estimate the cost of reproduction of lands:

21 "Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right-of-way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry and trade. Communities have long been dependent on its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture." (P. 452.)

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—

22 men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right-of-way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimate before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided." (P. 453.)

What is "the substantial question to be decided"?

"That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in

excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void be-
23 cause they do not permit a return upon an increment so calculated?" (Pp. 453, 454.)

After a short examination of the nature of public service property the court answers its own query:

"* * * And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not
24 properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right-of-way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, with additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which

were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'

"By reason of the nature of the estimates, and the points to which the testimony was addressed, the amount of the fair value of the company's land can not be satisfactorily determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive." (Pp. 454-456.)

It is contended that the Minnesota Rate Cases decision is inapplicable here because what was condemned in that case was the particular method there employed to show the cost of reproduction of land, and not what is here suggested by the carrier's witnesses as possible. It is urged that in the Minnesota Cases the market value of the railroad lands was not shown. What was condemned was the theory that the cost of reproducing the lands occupied by a railroad can be determined by a process of assuming a "railway value"
25 estimated in multiples of the present fair average value of similar lands in the vicinity, and the condemnation of the court was upon the ground that impossible and contradictory assumptions must necessarily be the basis for the attempt to ascertain the present cost of a railroad's lands. We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

The decision in the Minnesota Cases has since been generally accepted by courts and commissions as settling the disputed question whether the cost of reproduction theory could be made to apply to lands of a railway. See Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35, 42; Chicago & N. W. Ry. Co. v. Smith, 210 Fed. 632; Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

In the Denver Water Case in the United States district court for the district of Colorado, to enjoin the enforcement of rates filed by authority of law, the special master reported, inter alia, the value of the utility's lands. He said:

26 "The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. Minnesota Rate Cases, 230 U. S. 352, at 449-456. It follows from this rule that the original cost of the lands is not necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance dam-

ages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question in my judgment, always is, What is the present market value of similar lands in the same locality and not what are these lands worth now to the water company for the purposes for which they are now used?"

The utility excepted "because the master erred, as a matter of law, in refusing to consider, in determining the fair value of the lands, anything on account of the actual or estimated consequential or severance damages," and because he "erred in refusing to consider, in connection with the determination of the fair value of the lands,
or to include therein, anything whatever on account of over-
27 head expenses," claimed to be at least 10 per cent of the value of the lands for ordinary purposes. These exceptions were stricken by the district court. On appeal and cross appeal to the United States Supreme Court, that court treated as established the propriety of estimating the utility's property on the basis of present market values as to lands, and said that the method was fairly applied by the special master and was hardly disputed by the appellants, except as to certain matters other than his treatment of land. Denver v. Denver Union Water Co., 246 U. S. 178.

The use of multiples in ascertaining the cost of reproduction of lands embraced in railroad rights of way was discontinued by the Washington and California commissions, reversing their former practice and their earlier decisions. Public Service Comm. v. Seattle, Renton & S. R. Co., 4 Wash. Pub. Serv. Com. Ann. Rep. (1914), 132, 134; In re Value of Quincy Western Ry. Co., 8 Cal. R. R. Com. Dec. 340. This interpretation of the Minnesota Cases has been accepted as to telephone rights of way by the Colorado and Washington Commissions. Re Mountain States Teleph. & Teleg. Co., Colo. Pub. Util. Comm., P. U. R., 1917, B. 198, 265; Public Service Comm. v. Pacific Teleph. & Teleg. Co., Wash. Pub. Serv. Comm., P. U. R., 1916, D. 947, 54 A. T. & T. Co. Com. L., 171, 174. Certain other state commissions have never used multiples for the purpose of determining the cost of reproduction of lands. Re Illinois Terminal Ry. Co., 4 Ill., P. U. Com. Rep. 263, 266; Re Portland Ry. L. & P. Co., Oreg. Pub. Serv. Comm., P. U. R., 1916, D., 976, 1022.

Not alone do the uncertainties which we have referred to surround
what would be the conditions of ownership, of improvement.
28 and of value of near-by property, and of general industrial development, but there can be no certainty as to what land would have to be acquired at a cost to the carriers upon reproduction or a present acquisition. The carrier has been constructed within comparatively a recent period of time; nothing in the record shows

us that the reproduction of the road would be regarded in any less friendly spirit by the community as a whole and individual owners in particular, than when the right of way and terminals in question were acquired but a few years back. As appears elsewhere in this report, of approximately 1,933,065 acres of carrier lands, 511,008 acres were acquired by the carrier through aids, gifts, grants of right of way, and donations.

Of the total original cost of the carrier lands, approximately 40 per cent was donated by citizens of various communities along the line. That all such donated lands would necessarily have to be bought or condemned and paid for at the full amount which a jury would award on condemnation is an assumption we do not feel warranted in making from the record before us. Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto.

29 EXHIBIT B.

Before the Interstate Commerce Commission.

Valuation Docket No. 4.

In the Matter of the Valuation of the Property of THE KANSAS CITY SOUTHERN RAILWAY COMPANY et al.

Affidavit.

STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore and J. M. Souby, each being first duly sworn, upon his oath says:

Following the service upon the Carrier by the Interstate Commerce Commission of the tentative valuation of its property in November, 1916, we both entered upon active charge of the case as attorneys for the Carrier and after the preparation and filing of the protest against the tentative valuation proceeded in the collection and preparation of evidence regarded by us as necessary to sustain the allegations of fact made in the protest. Among other things we deemed it advisable to have evidence as to the cost of acquiring the lands of the Carrier by purchase or condemnation at valuation date. Upon taking charge of the case, we had learned that an appraisement had previously been made on behalf of the Carrier of its entire right of way and other lands on the basis followed by the Bureau of Valuation, designed to serve as a check upon the similar work of the

Bureau; that is, there had already been made an appraise-
30 ment of the fair market value on valuation da'e of the naked land adjoining and adjacent to the lands of the Carrier and regarded by the particular appraiser as of similar character and of about the same average value as the Carrier's lands, such appraisal having been made as to each county separately by an experienced real estate man employed in each county for that purpose. No appraisal had been made, however, of the cost of acquiring the Carrier's lands by purchase or condemnation as provided by the Valuation Act. Accordingly, before the first assignment of this case by the Commission for the taking of testimony generally, we made arrangements in March, 1917, for the making of such appraisement of the Carrier's lands in Kansas City and Jackson County, Missouri, and this work was undertaken and carried out immediately by Mr. Frank McMillan. On March 6, 1917, at Kansas City, it was agreed with the Director of Valuation that the Carrier would not be expected to present this class of testimony at the hearing before the Commission then set for March 19, 1917, as appears from letter signed by S. W. Moore and Pierce Butler dated March 7, 1917, and addressed to the Director, hereto attached and marked Exhibit "A" and the Director's reply thereto dated March 9th, 1917, hereto attached marked Exhibit "B."

Before similar arrangements had been made for carrying out this work on the balance of the line, we both attended the general hearing in Washington in the several consolidated cases, beginning March 19th, 1917, at which evidence was taken upon this subject of the cost of acquiring railroad lands. In view of the admissions made by the Director of Valuation at that hearing (see printed transcript of testimony, pages 672 and 673) to the effect that the use of
31 a multiplier to determine cost of acquisition of lands in excess of the naked value of adjoining lands was feasible, we felt that there was every possibility of our being able to reach an agreement with the Bureau of Valuation with respect to this matter, which would entirely obviate the necessity of taking testimony thereon, and accordingly decided to defer undertaking the contemplated appraisements of the Carrier's lands south of Jackson County, Missouri, until such time as we found it impossible to make such agreement.

Upon our return from Washington we began negotiations with the representatives of the Bureau of Valuation at Kansas City with respect to various other matters put in issue by our protest, in an effort to reach an agreement with respect thereto which would eliminate the necessity of covering the same by testimony. In the meantime this case was set down for the hearing of testimony at Kansas City on May 23, 1917. In a letter of May 12th, 1917, however, the Director advised that the case might be continued, but he would come on to Kansas City in any event, arriving on May 22, 1917, the purpose of such visit being as he expressed it, in his letter of May 18th, 1917, "to look over matters with you and possibly reach some agreement as to some disputed issues." Such a visit for this purpose had already been promised by the Director in an earlier letter, dated April

24, 1917, which is attached hereto, marked Exhibit "C." By order of the Commission entered May 19th, 1917, the hearing was continued indefinitely, a letter from the Director dated May 18, 1917, stating that such an order would be entered on account of the fact that the hearing in the Texas Midland case was still going on.

32 At a conference with the Director beginning on May 22, or May 23, 1917, an agreement was reached with respect to the matter of ascertaining the cost of acquiring lands by purchase or condemnation identical with or substantially identical with that finally employed in the stipulation which has been filed in this case (our Abstract, pp. 969-970), as follows, to-wit:

"Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

"It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

"It is, therefore, understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and introduce testimony in modification of

33 the same which it has to any other fact stated in the Tentative Valuation.

"If, in the opinion of the Commission, it transpires, at any state of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

In reliance upon the agreement then reached, we regarded it as wholly unnecessary and consequently as involving an unnecessary expense to proceed further with the preparation of testimony of any character relating to this question. The whole matter was allowed to rest until the service upon the company of notice on August 29th, 1918, that the stipulation in certain respects was not approved by the Commission and that a hearing would be held at Kansas City Sep-

tember 9, 1918, for the purpose of giving the Carrier an opportunity to offer evidence on all questions left open by the stipulation and affected by the Commission's failure to adopt the same.

At the time of the service upon the Carrier of this notice of hearing for September 9, 1918, Mr. Moore having severed all connection with the Carrier and occupying the position of General Solicitor to the Federal Manager of the Carrier's properties, had likewise for the time being ceased to participate as a representative of the Carrier in this case. It was not until about September 7th, 1918, that he received notice that Judge Payne, at the request of the General
34 Counsel of the Company, had assented to his further participation in the case as counsel for the Carrier.

Mr. Souby, who was still representing the Carrier in the case, was absent from the city and had no knowledge of the hearing until his return on September 3, 1918. Shortly after his return and some three or four days prior to the date fixed for the hearing, he held a conference with the Valuation Attorney, Mr. C. F. Newman, with respect to the character of evidence which he intended to offer on behalf of the Carrier. When the matter of testimony with respect to the question of the cost of acquiring lands at date of valuation by purchase or condemnation was discussed, Mr. Newman stated that it was his intention to object to the introduction of any such evidence because, as he understood the effect of the Commission's decision in the Texas Midland case, such evidence would not be considered by the Commission. Mr. Souby, feeling confident that such an objection made by the representatives of the Bureau of Valuation would in all probability be sustained by the Examiner, decided that it would be fully sufficient for the protection of the Carrier to make an offer of same with respect only to Jackson County, and the record of the hearing shows that such was done. The action of the Examiner in sustaining the objection to this character of testimony was in effect overruled by the Commission when it set the case for hearing on October 7, 1918, for the sole purpose of taking evidence with respect to this question. The notice of the last mentioned hearing was received by the Carrier's representatives at Kansas City on Friday, October 4th, 1918, but one week day intervening between the date of the notice and the date fixed for the hearing.

35 If it had appeared at the time of the receipt by Mr. Souby of the notice of the hearing fixed for September 9th, 1918, that testimony of the character here under consideration would be received by the Examiner, there would have been time intervening between such date and the date of the hearing and the time which would be consumed in introducing the testimony which the Carrier was already prepared to offer, to enable it to make a beginning in the preparation of testimony with respect to the cost of acquiring its lands south of Jackson County, Missouri, although such testimony would of necessity have been hastily prepared and therefore not entirely satisfactory. There was not time, however, after receipt of notice of hearing set for October 7, 1918, to make any sort of preparation for such testimony and have it available for introduction in evidence at the hearing fixed for that date, and accordingly we

did not undertake to have such appraisement started, but undertook instead to secure some agreement with the representatives of the Bureau of Valuation and with the Commission which would enable us to secure and offer same.

The notice that hearing would be had at Kansas City on October 7, 1918, was received in the form of a telegram from Commissioner B. H. Meyer, addressed to Mr. Souby, dated October 3rd and received here October 4th. On October 5th the following telegram, signed by Mr. Souby, was sent to Commissioner Meyer:

"Your telegram third instant re Kansas City Southern Valuation. When testimony was taken here Sept. ninth there was an advance understanding that our evidence as to cost of acquisition of lands would be excluded in view of Commission's ruling in Texas
36 Midland case and that our contention would be preserved by offers of testimony, and this was done. Stop. Legal Evidence of the cost of acquisition by purchase or condemnation should I suppose in the absence of some agreement to the contrary, be directed to each parcel or tract of land and this data we had assembled for Kansas City and Jackson County when the stipulation pages nine sixty nine and nine seventy of our abstract was made which rendered unnecessary the assembling of similar data at other points on the line. We are prepared to introduce all the testimony that we have at the hearing beginning here next Monday, but it is utterly impossible to secure similar data on some seven hundred miles south of Jackson county in time for hearing now set for October seventeenth. Will not the Commission in view of this situation consent that outside of Kansas City and Jackson County we may introduce testimony showing cost of acquisition by the percentages or multiples over normal land values, without making a separate problem of each tract or parcel."

On October 7th the taking of testimony began before Examiner Kimball at Kansas City and we proceeded to introduce our testimony with respect to the cost of acquisition by purchase or condemnation of the lands of the Carrier at valuation date in Jackson County, Missouri, including Kansas City, which, as above stated, had been previously prepared. We frankly stated to the Examiner and to Mr. Benton and Mr. Newman, counsel for the Bureau of Valuation, that we were not prepared to introduce testimony except as to Jackson County, Missouri, for the reason, as above stated, that the necessary data had not been assembled and the witnesses had not been qualified, because reliance had been placed upon the stipulation.

37 No answer having been received from Commissioner Meyer to our telegram of October 5, 1918, we had a conference with Messrs. Kimball, Benton and Newman on October 8th, giving them a copy of our telegram to Commissioner Meyer of October 5th above quoted, and we suggested that arrangement be made by which time might be given us within which to qualify our witnesses upon the subject of the cost of acquisition of the Carrier's lands by purchase or condemnation, south of Jackson County, Missouri. After a full discussion of the matter, the gentlemen named, on October 8th, sent the following telegram to Commissioner Meyer:

"Situation is that Carrier is now introducing evidence in tabular

form showing original cost and value at time of acquisition of all lands Jackson County including Kansas City. Carrier not in position to introduce like testimony for balance of line but if we proceed now must introduce oral evidence showing value at time of acquisition for each parcel of entire line (which will perhaps take two or three weeks) Souby proposes to adjourn hearing submitting whole matter to Commission on seventeenth Period. If Commission decides to take further testimony Carrier will at subsequent date be prepared to introduce it in tabular form for any or all counties.

Souby ready to make agreement as follows which Benton and Newman recommend.

Evidence Kansas City and Jackson County to be taken Carrier claims evidence typical in principle of all counties Bureau does not admit it is typical and reserves right on order of Commission to take evidence covering counties claimed to be typical Case to be argued seventeenth before Commission all questions Period. After argu-
ment Commission to decide before report whether evidence
38 covering any or all other counties shall be taken Carrier
agrees that if Commission determines to apply multiple comma the multiple two may be applied outside cities in all other counties without taking further evidence except as Commission may take typical counties upon request Bureau Period. If evidence taken after argument neither party to claim oral argument before Commission but may file brief or make oral argument before Examiner Thereupon Commission may render decision upon all issues raised by protest period. Souby's agreement is subject to approval Untermyer now requested by wire Untermyer to advise Commission direct."

The foregoing telegram came to our notice October 9th, and a telegram was immediately sent to Samuel Untermyer, General Counsel of the company at New York City, asking for authority to join in proposed agreement. The requested authority was duly received, and accordingly a telegram to that effect was sent to Commissioner Meyer on October 9th, as follows:

"Suggestion wired you yesterday by Kimball, Benton and Newman is satisfactory to Mr. Untermyer, Souby and myself, with understanding that if Commission determines to ascertain and report cost of acquisition of lands by purchase or condemnation such data shall be ascertained for entire line by taking of testimony or agreement upon multiple."

No reply to either telegrams has been received from Commissioner Meyer.

When we had concluded the introduction of testimony as to Jackson County, on October 10th, 1918, as aforesaid, we asked the Examiner to adjourn the hearing until witnesses could be prepared to
testify as to lands south of Jackson County. There was
39 an extended conference upon this subject. We explained at
length that the testimony was not then available, for reasons heretofore stated, but that we would proceed with all speed to make it presently available. We produced before the Examiner Mr. J. L. Faris, who, with Mr. Edwin (who was likewise in the city and available) were familiar with the lands of the Carrier covering its entire

line from Jackson County south to the Gulf, having made a joint appraisement of said lands with Mr. Minor, representing the Bureau of Valuation. Mr. Faris stated that he was prepared to leave Kansas City at once and make the necessary examination of lands in Cass County, Missouri, and return the following Monday, October 14th, and testify in reference thereto, returning immediately to qualify himself to testify with reference to the lands in the next county south and so on, and we offered to send out Mr. Edwin immediately, so that he could likewise qualify himself and return to Kansas City to give his testimony, so that the taking of testimony beginning October 14th might proceed continuously until completed, except for the time during which Mr. Souby and Mr. Moore would necessarily be absent in Washington to attend the argument of the case set for October 17th. The Examiner refused to permit any continuance or adjournment whatsoever, or to afford us any opportunity whatsoever to produce our testimony, and closed the hearing against our strong protest.

On the same day, October 10th, we sent the following telegram to Commissioner Meyer:

"Kansas City Southern Valuation. We have completed today all testimony now available, which includes cost of acquisition by purchase or condemnation of lands in Jackson County, Mo., including Kansas City. We did not assemble data and qualify witnesses to give similar testimony outside of Jackson County because we relied on the stipulation set forth in our abstract pages nine sixty nine and nine seventy. We can make a beginning on this testimony next Monday, continuing until same is completed, except during period when we are necessarily absent to attend Washington hearing now set for October 17th. Examiner Kimball acting on instructions declines to adjourn hearing until next Monday so this program may be carried out. We should be permitted to introduce this testimony. The delay is no fault of ours. Will not Commission authorize examiner to hear it? Will greatly appreciate telegraphic reply."

On October 12th the following telegram was received from Commissioner Meyer, which was the only direct answer to our telegrams above quoted:

"Instructions have been wired to the examiner."

We immediately called up Mr. Newman, Valuation Attorney, to find out the meaning of the telegram, and he explained that instructions had been received to read into the record Mr. Untermyer's motion for the taking of testimony, which, as Mr. Newman advised me, had already been done. He also stated that the examiner had left Kansas City before the telegram had been received.

S. W. MOORE.
J. M. SOUBY.

Subscribed and sworn to before me this 17th day of October, 1918.

ALFRED HOLMEAD,
Notary Public.

41 Supreme Court of the District of Columbia.

At Law. 61/917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Order.

Upon the annexed petition of Kansas City Southern Railway Company, verified by its secretary, G. C. Hand, on the 3rd day of December, 1918,

It is ordered that the above-named respondent, Interstate Commerce Commission of the United States, show cause at a session of this Court, to be held in the court house of the Supreme Court of the District of Columbia in the City of Washington, on the 10th day of December, 1918, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting a peremptory writ of mandamus requiring the respondent to investigate, take and receive testimony, including such competent proof that relator may offer, and ascertain, find and report in detail the present cost of condemnation and dam-
42 ages or of purchase in excess of original cost or present value of lands owned or used by relator, in conformity with the provisions of the Act of Congress of March 1, 1913.

And respondent is further required to show cause at said time and place why, in case this Court shall refuse such peremptory writ, an order should not be granted directing that an alternative writ issue requiring and directing said respondent to perform the aforesaid acts in compliance with said Act of Congress, or show cause before this Court, at such time as may be fixed by this Court, why a peremptory writ of mandamus should not issue to that effect.

Sufficient reason appearing therefor, let service of this order and the papers upon which it is granted, on the respondent, on or before the 6th day of December, 1918, be deemed sufficient.

Dated, Washington, D. C., December 5th, 1918.

WALTER I. McCOY,
Chief Justice of the Supreme Court of the District of Columbia.

42*a* Filed Dec. 10, 1918.

In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of the Interstate Commerce Commission.

P. J. Farrell, for Respondent.

43 In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

44 I.

Answering paragraph First of the petition: Respondent admits the allegations contained in this paragraph.

II.

Answering paragraph Second of the petition: Respondent admits the allegations contained in this paragraph, except that Respondent alleges that it has not information sufficient to enable it to form a belief as to whether Relator expended $250,000 as alleged in this paragraph, and therefore neither admits nor denies said allegation.

III.

Answering paragraph Third of the petition: Respondent denies that it entered into a stipulation as alleged in this paragraph. In this connection Respondent alleges that said stipulation was entered into by and between representatives of the Relator, on the one hand, and C. A. Prouty, Director of Valuation, on the other hand, and that the latter did not have and did not claim to have authority to bind Respondent in the premises.

IV.

Answering paragraph Fourth of the petition: Respondent admits that its refusal to find and report present cost of condemnation and damages or of purchase as alleged by Relator was based upon Respondent's interpretation of the decision of the Supreme Court of the United States in the Minnesota Rate cases, 230 U. S. 352,
45 and alleges that said refusal was also based upon the impossibility of discovering any lawful or reasonable basis upon which to rest such a finding and report.

V.

Answering paragraph Fifth of the petition: Respondent admits the allegations contained in this paragraph.

VI.

Answering paragraph Sixth of the petition: Respondent admits the allegations contained in this paragraph, except that it denies that Respondent's Examiner either declined or refused to receive at said hearing of October 7, 1918, any evidence offered by Relator.

VII.

Answering paragraph Seventh of the petition: Respondent admits the allegations contained in this paragraph.

VIII.

Answering parargaph Eighth of the petition: Respondent admits the allegations contained in this paragraph.

IX.

Answering paragraph Ninth of the petition: Respondent denies that its refusal to find present cost of condemnation and damages or of purchase in excess of original cost or present value of
46 Relator's lands will result in great wrong or injury or in any wrong or injury to relator; denies that Relator has offered to

Respondent definite, competent proof or any competent proof of the present cost of condemnation and damages or of purchase as alleged by Relator, and alleges that the other allegations contained in this paragraph are based entirely upon speculation and that for this reason it is not incumbent upon Respondent to make answer to them.

X.

Answering paragraph Tenth of the petition: Respondent denies that Section 19*a* of the Act to regulate Commerce, commonly known as and called the Valuation Act of March 1, 1913, makes no provision for a review of the proceedings and findings of respondent with respect to respondent's valuations. In this connection, respondent alleges that the thirteenth paragraph of said Valuation Act reads as follows:

"If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the
47 first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order."

Respondent denies that, unless this Court issues a writ of mandamus in accordance with the prayer of relator's petition in this case, relator is without a complete and adequate remedy for any damage or injury it may suffer by reason of respondent's said refusal to attempt to find and report the present cost of condemnation and damages or of purchase of the lands included in the right of way, yards, and terminals of relator's railroad, used by relator as a common carrier in serving the general public, in accordance with paragraph entitled "Second" of said Valuation Act, set forth in relator's petition, and denies that, unless this Court issues such a writ, relator will suffer great damage and injury or any damage or injury.

XI.

Answering paragraph Eleventh of the petition; Respondent alleges that it has not information sufficient to form a belief as to whether

relator has heretofore made an application to any Court or Judge for the relief prayed for by relator in this case, but respondent assumes that relator's allegation in this connection is correct.

48 Further answering the allegations contained in relator's petition, respondent alleges: That an attempt to find and report said present cost of condemnation and damages or of purchase is an attempt to ascertain and report the actual cost of acquiring the lands included in said rights of way, yards, and terminals upon the assumption that the railroad of which they are a part is not in existence; that to make such an attempt is to indulge in mere speculation; that the railroad has long been established; that to it have been linked the activities of agriculture, industry, and trade; that communities have long been dependent upon the services of the railroad and that their growth and development have been conditioned upon the facilities it has provided; that the uses of property in the communities served by the railroad are to a large degree determined by it; that the values of property along the line of the railroad largely depend upon its existence; that the railroad is an integral part of the communal life; that the assumption of the non-existence of the railroad, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained; that the conditions of ownership of said lands and the amounts which would have to be paid in acquiring them, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination; that it is impossible to describe the conditions that would exist, or the exigencies of the hypothetical owners of said lands, upon the assumption of the removal of said railroad; that the evidence introduced before Respondent in connection with the valuation of said lands establishes that at the time said railroad was con-

49 structed a large portion of said lands was donated to Relator by members of the general public; that at said time another portion of said lands was purchased by Relator; that at said time Relator obtained title to another portion of said lands through condemnation proceedings; that upon the assumption of the removal of said railroad and of its reproduction it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by Relator, or the portion thereof Relator would have to acquire title to through condemnation proceedings; that it is apparent that the removal of said railroad and the immediate reproduction thereof would not damage in any manner or to any extent any of the lands adjoining or adjacent to said railroad or the owners of such adjoining or adjacent lands, and that it is impossible to determine that upon the assumption of the removal of said railroad the title to the lands included therein would revert to or be vested in the owners of said adjoining lands. In this connection Respondent alleges, by way of illustration, that Chapter 8 of Article 6532 of the Statute Laws of the State of Texas, which is the law in force at the present time in that State, provides as follows:

The right of way secured or to be secured to any railway company in this State in the manner provided by law, shall not be so construed as to include the fee simple estate in lands either public or private

nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way, without a new condemnation.

50 All of which matters and things Respondent is ready — aver, maintain and prove as this honorable court shall direct, and thereby prays to be hence dismissed.

INTERSTATE COMMERCE COMMISSION,
(Sig.) By P. J. FARRELL, *Chief Counsel.*

WASHINGTON,
District of Columbia:

I, Henry C. Hall, depose and say that I am a member of the Interstate Commerce Commission, the Respondent in the above entitled proceeding; that I have read the foregoing answer of Respondent and know the contents thereof, and that matters of facts therein stated are true according to my best knowledge, information and belief.

(Sig.) HENRY C. HALL,
Members of Interstate Commerce Commission.

Subscribed and sworn to before me, Alfred Holmead, Notary Public in and for said District of Columbia, this 7th day of December, A. D. 1918.

(Sig.) ALFRED HOLMEAD,
[SEAL.] *Notary Public.*

50*a* Filed Dec. 18, 1918.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Amended Petition and Order for Writ of Mandamus.

Samuel Untermyer, Samuel W. Moore, Frank M. Swacker, Counsel for Relator, Wilkins Building, Washington, D. C.

51 Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Amended Petition for Writ of Mandamus.

To the Supreme Court of the District of Columbia:

Comes now The Kansas City Southern Railway Company and respectfully shows to this Court:

First. That it is a corporation common carrier engaged in the transportation of persons and property by railroad between places in various States of the United States, and so subject to the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," etc., and acts supplemental thereto and amendatory thereof, including the Act of March 1, 1913 (38 U. S. Statutes at Large, page 701), commonly known as the Valuation Act, which Act, among other things, provides as follows:

52 "Sec. 19*a*. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in
53 excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed."

Second. That heretofore, and in or about the year 1914, the respondent, the Interstate Commerce Commission, pursuant to the provisions of the said Act of March 1, 1913, acting through its Bureau of Valuation which was in charge of its Director of Valuation, Hon. C. A. Prouty, began an investigation to ascertain the value of the property of the relator as of June 30, 1914. On or about November 20, 1916, the respondent published and served upon the relator a copy of its tentative valuation under the said Act. In said tentative valuation the so-called present value of the lands of the relator was fixed at $2,163,870.07, and the original cost, when acquired by the relator approximately 20 years prior thereto, was given as $2,248,058.13. Said tentative valuation did not state, nor purport to state, the "present cost of condemnation and damages or of purchase," nor the cost of reproduction, of the relator's lands, or any part thereof.

Relator, within the time limited in the said Act, duly filed its protest against said tentative valuation, in which, among other things, it protested against the failure of the respondent to find the "present cost of condemnation and damages or of purchase," or the cost of reproduction, of said lands, and prayed to be allowed to introduce competent and legal testimony, in such manner and at such
54 time as the Commission might direct, to prove the reproduction cost and the "present cost of condemnation and damages or of purchase" of all its lands. Thereupon it became the duty of the respondent to fix a time for the hearing of said protest and to hear and consider any matter relative and material thereto, in accordance with the following provision of the Act:

If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid.

Testimony was taken from time to time by the relator in support of its protest until about October 7, 1918, as hereafter more specifically set forth, and likewise, stipulations were entered into, as hereafter referred to, covering certain matters in the relator's protest where agreements between the parties had been reached. Many thousands of pages of testimony were thus taken, the entire proceeding under the Act involving a total expense of over $250,000.00 to the relator, besides a very large sum expended by the respondent.

Third. That following the filing of its protest as aforesaid, and as a result of negotiations, certain agreements were reached between re-

lator and said Bureau of Valuation, an agency of the respondent and engaged under its direction and control in the investigation and valuation of respondent's property, with respect to many of
55 the matters put in issue by relator's protest against the tentative valuation, and such agreements were embodied in a formal stipulation signed by relator and the Director of Valuation in May, 1917, and filed in said proceeding before respondent. Such stipulation contained, among others, the following provisions:

Stipulations.

The following agreement is entered into between the Division of Valuation of the Interstate Commerce Commission (subject to the approval of the Commission) and The Kansas City Southern Railway Company and subsidiary companies named in the protest filed by them herein (all hereinafter referred to as the 'Carrier'), and the same shall be filed as a part of the record herein without prejudice to the right of either party to supplement same by the introduction of testimony as to any matter not finally disposed of herein.

It is further agreed that in event the Commission shall disapprove the action of the Bureau of Valuation in any particular matter, then insofar the Carrier shall be absolved from the obligation devolving upon it; and further, that this stipulation is made wholly without prejudice to any right which the Carrier may have under the law to obtain a judicial review of the determination which the Commission shall make in the premises, either with respect to question of law or of fact, save such facts as are expressly admitted.

* * * * * * *

Lands.

1. Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each
56 individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

It is therefore understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such mul-

tiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and to introduce testimony in modification of the same which it has as to any other fact stated in the Tentative Valuation.

If, in the opinion of the Commission, it transpires, at any stage of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

57 Fourth. That during the time the respondent was engaged in its investigation of relator's property, it was also engaged in an investigation to ascertain the value of the property of the Texas Midland Railroad Company, which investigation it completed December 14, 1917, and on July 31, 1918, rendered its decision, report and findings, which are set forth in Valuation Reports of the Interstate Commerce Commission No. 1, at page 1, and here referred to as though set out in full. As appears by reference to said report (pages 52 to 62, inclusive, a copy of which is hereto annexed as Exhibit A hereof), the respondent, notwithstanding the express direction contained in the paragraph denominated Second of Section 19*a* of said Act of March 1, 1913, above set forth, refused and declined to find and report with respect to lands owned and used by said Texas Midland Railroad Company the then "present cost of condemnation and damages or of purchase in excess of such original cost or present value," basing its said refusal upon respondent's interpretation of the decision of the Supreme Court of the United States in the Minnesota Rate Case, 230 U. S. 352.

Fifth. That after respondent had reached the conclusions set forth in said Texas Midland Railroad Company valuation above mentioned, upon August 29, 1918, it notified the relator that it would not adopt the plan of determining the present cost of condemnation and damages or purchase set forth in the stipulation above mentioned, and in conformity with the other provisions thereof assigned the subject for hearing and the introduction of proofs before an examiner of respondent at Kansas City, Missouri, September 9, 1918.

58 That thereupon relator commenced the preparation of evidence with respect to such present cost of condemnation and damages or purchase with respect to each parcel of land owned or used by it, and on September 9, 1918, proffered evidence thereof, the admissibility of which, in view of said Texas Midland decision, was questioned by counsel for respondent and thereupon excluded by said examiner of respondent.

Sixth. That on October 1, 1918, relator filed its motion with respondent to overrule said examiner and take such evidence so offered by relator in accordance with the provisions of said Act of March 1, 1913, and on October 4, 1918, respondent made its order directing that said matter be re-opened for the taking of testimony and as-

signed the same for hearing before one of its examiners upon October 7, 1918. That said examiner, on said date, proceeded to take and receive testimony and evidence upon said subject, and relator produced evidence thereon respecting so much of its lands as are located in Kansas City and Jackson County, Missouri, and relator, being unprepared to proceed therewith at the time, moved and requested the Examiner for an opportunity later to introduce testimony and evidence in relation to the remainder of its line of railway, some 700 miles or more in length, of a nature and character more particularly discussed in paragraph ninth hereof, but said examiner, acting upon the direction of respondent, declined and refused to grant such motion and request; and respondent directed that the hearing upon the valuation of relator's property be thereupon closed and final argument of the entire matter of the valuation of relator's property be had before respondent October 17, 1918, the date already fixed therefor.

59 Seventh. That on October 17, 1918, the relator renewed its application before respondent to be allowed to make proof concerning such present cost of condemnation and damages or of purchase with respect to the remainder of its line, and counsel for relator accompanied said motion with an affidavit setting forth the facts and circumstances in relation to said matter, a copy of which is hereto attached and marked Exhibit B, but respondent, declining then to rule upon said motion, required counsel for relator to proceed with final arguments upon the whole valuation of relator's property. Counsel for relator renewed said motion in the course of said argument and again at the conclusion of said final argument, and subsequent thereto, on November 15, 1918, was advised by respondent that at its session on that date it had adopted a resolution in words as follows:

"Voted that, for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and damages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative."

Eighth. That respondent has concluded its investigation with respect to relator's property without complying with the requirement above set forth, of said Act of March 1, 1913, with respect to present cost of condemnation and damages or of purchase in excess of original cost or present value, which requirement respondent has definitely informed relator it does not intend to comply with for the reasons above stated, and it is now considering and preparing

60 and will make its report upon relator's property without making such finding.

Ninth. That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by judicial award in con-

demnation proceedings during four years immediately preceding said valuation at an actual cost to relator of $180,000; and in the aggregate will result in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found.

Such refusal, if persisted in by the respondent, is likely to result in a valuation of the relator's property at a value less by many millions of dollars than it is justly and fairly entitled to, and such valuation being a public record, is likely to seriously and injuriously affect the relator's credit, and impair its ability to borrow money to meet its capital requirements and to properly and economically conduct its railroad operations.

Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:

61 Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid.

Inasmuch as the purpose of the Act, in requiring the cost of reproduction of lands and other property of the relator, is that the same may be used by the respondent in ascertaining and determining the final value of all the relator's property, regardless of how the same was acquired, relator is prepared and has offered to establish the cost of reproduction or the "present cost of condemnation and damages or of purchase" of all its lands regardless of whether they were originally acquired by it through purchase, or condemnation,

62 or exchange, or by gift or donation.

Tenth. That said Act of Congress makes no provision for a direct review of the proceedings and findings of the respondent with respect to its valuations, and makes no provision whatsoever for any review except as provided in paragraph thirteen of the said Act which makes the respondent the final judge of the law and the fact

without the right of appeal therefrom and is wholly inadequate for the protection of the relator. The relator is without a complete and adequate remedy for the great injury it will suffer by reason of the denial by respondent of the rights accorded it by said Act of Congress and the injury which will result from respondent's proposed incomplete finding; and the relator will suffer great damage and injury as a result of said proposed course unless this Court, by issuing its writ of mandamus, directs respondent to comply with the requirements of said Act.

Eleventh. That no other or previous application for the relief prayed for herein has heretofore been made to any Court or Judge.

Wherefore, relator prays for an order herein directing that a peremptory writ of mandamus go to the respondent directing and requiring it to investigate, take and receive testimony, including such competent proof as relator may offer, in accordance with the provisions of said Act of March 1, 1913, upon, and ascertain, find and report in detail, the present cost of condemnation and damages or of purchase in excess of original cost or present value of lands owned or used by relator; or, if the Court be not minded to issue its
63 peremptory writ, then that its order issue directing that an alternative writ of mandamus go, commanding the respondent to perform the aforesaid acts or to show cause why a peremptory writ of mandamus to that effect should not go.

And that the relator have such other or further order or relief as to the Court may seem just and proper.

And as in duty bound the relator will ever pray.

Dated, New York, December 18, 1918.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By G. C. HAND, *Secretary.*

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
FRANK M. SWACKER,
Attorneys for Relator.

Wilkins Building, Washington, D. C.

STATE OF NEW YORK,
County of New York, ss:

G. C. Hand, being duly sworn, deposes and says:

I am Secretary of The Kansas City Southern Railway Company, and executed and subscribed the foregoing amended petition on its behalf.

I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me this 18th day of December, 1918.

[SEAL.] JULIAN RICE,
Notary Public, No. 188, New York County.

64 EXHIBIT A.

Valuation Reports of the Interstate Commerce Commission.

Valuation Docket No. 2.

Texas Midland Railroad.

Submitted December 14, 1917.

Decided July 31, 1918.

Report of the Commission.

* * * * * * *

Lands.

The protest raises two questions, which in fact are one: (1) Shall the Commission ascertain and report the reproduction cost of carrier lands, and (2) shall the Commission ascertain and report the present cost of condemnation and damages or of purchase of the carrier's lands? Together these questions present the issue as to the duty of the Commission to report the reproduction cost of lands.

What is meant by present value, as the term is used in the tentative valuation, is thus defined by the director of valuation:

"Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use. Nothing is included for the expense of acquisition,
65 nor for severance damages, nor for interest during construction."

The second paragraph in the act, entitled "First," is general in terms, and directs the Commission to ascertain and report in detail as to each piece of property owned or used by the common carrier under investigation for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reasons for their differences, if any. There is no substantial question raised by the protest as to the reporting of original cost to date of lands. The essential question is with respect to the reporting of the cost of reproduction new.

The paragraph of the act entitled "Second" requires:

"Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

The paragraph entitled "Third" relates to property held for purposes other than those of a common carrier; and such investigation and report is required to show separately such property and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

The sixth paragraph, entitled "Fifth," relates in part to
66 land grants, which are not here involved. The paragraph also provides:

"The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the government of the United States or by any state, county, or municipal government, or by individuals, associations, or corporations."

It was suggested upon argument that the paragraph entitled "Second" could apply only to properties as to which there had been an original cost, and that lands which cost the carrier or its predecessors nothing were governed by the paragraph entitled "Fifth." It was urged that lands which cost the carrier nothing were to be excluded from the direction in paragraph "Second" as to the ascertainment of the original and present cost of condemnation and damages or of purchase in excess of such original cost and present value. Unless the present cost of condemnation and damages or of purchase is to be reported, which is not contemplated by the tentative report, it is unnecessary to construe these two paragraphs with respect to this contention. Applying familiar rules of statutory construction, the fact that lands, rights of way, and terminals are given specific detailed treatment in paragraphs "Second" and "Fifth" of the act points out that the latter specific requirements are to be followed rather than the preceding general language.

However, the direction in paragraph entitled "Second" for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of repro-
67 duction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier

to pay sums in excess of the value of the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights. It was testified that inquiry had shown that a relationship could be found in particular cases between the sums which the carrier must pay and the present or market value of a like area of similar, contiguous property; and it was claimed that such sum could be estimated in advance of construction within a few per cent of the amount which would actually be required. There is also testimony that certain state commissions, in attempting to determine the cost of reproduction of railroad lands, had made use of multiples of the value of adjacent, similar land for this purpose.

But it will be observed that in each of these cases, other than the state commission valuations, the testimony before us related
68 to the actual production of a railroad where no railroad had been before; and in none of these cases did the facts exist which necessarily must be assumed for a rational conception of the process of reproduction. That there is a marked difference between assuming in advance the total cost of acquisition whether as the result of condemnation and damages paid or of purchase, in excess of the present value of similar lands in the vicinity, when no railroad has been constructed or is in operation, and the attempt to ascertain and state the cost of reproducing or reacquiring, at the present time, lands which actually have been severed from the adjacent property, have been converted into a railroad, and are being occupied by an operating rail carrier, seems clear.

We are unable to differentiate the character of testimony before us from that which was before the Supreme Court in the Minnesota Rate Cases, supra. That decision, rendered June 9, 1913, slightly over three months after the enactment of the act, was the climax of a long series of attempts made by various state commissions and courts to apply the cost of reproduction theory to railroad lands.

The Supreme Court pointed out the nature of the assumptions which must be made in the endeavor to apply the cost-of-production theory to lands. In those cases was involved the estimate of the value of the property of the railroad within the state of Minnesota as a necessary factor in determining whether the legislative-made rates at issue were confiscatory. The question presented, said the Court, was as to the soundness of the underlying estimate of value, and whether it might be accepted as a basis for a finding that
69 the rates were confiscatory.

In the master's report was an item for "lands for right-of-way, yards, and terminals, $21,024,562," which did not include any improvements. This value was arrived at by adding 5 per cent to the appraisement of the terminal properties "for the cost of acquisition and consequential damage," and 25 per cent was added in the case of the Duluth terminals for railway value, cost of acquisition, and consequential damages. The manner in which the base figure

was deduced is afterwards stated herein. There was a protest by the state authorities against the sum so reported, and the court thus summarizes the basis for the protest:

"It is contended that the valuatio.. .as made upon a wrong theory; that it is a speculative estimate of 'cost of reproduction'; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right-of-way, yards and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state and the location, population, and activities of town-, villages, and cities, were as they now are." (P. 444.)

The method pursued in ascertaining the base figures is thus stated by the Supreme Court:

"(*a*) Lands outside terminals.—The complainants' witness was Mr. Cooper, the land commissioner of the company, who has charge of the land grants for its entire system, of its right-of-way and land purchases, and has had a wide experience in connection with
70 land values along the lines of the railway. In the latter part of 1906, the state notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column, of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the state, he set down under the heading of 'market value,' not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right-of-way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the 'market value' as stated (in the case of agricultural lands generally multiplying it by three) and thus reached the amount set down as the 'value for railway purposes.'" (P. 445.)

Local real estate experts were employed to appraise the terminal properties at St. Paul, Minneapolis and Duluth. They were instructed "to make a conservative report of the cost of reproducing the properties owned by the company in each of their respective cities." Mr. Cooper, after discussing with these experts the estimates made by them, employed his own knowledge and formed his own
71 judgment, which he reported to the state under the heading of "market value." His estimate of market value was "what

it would cost the company to purchase these lands, exclusive of improvements that might be made upon them, severance and consequential damages and expenses incident to acquisition." The master adopted the Cooper figures without change as to the St. Paul and Minneapolis terminals, and added 5 per cent to cover the cost of acquisition and consequential damages. As the Duluth appraisement seemed to have been based upon the ordinary values of real estate, and not on as liberal a basis as that at the twin cities, the master added 25 per cent for "railway value, cost of acquisition and consequential damages."

"In reviewing the findings, the court below reached the conclusion that 'the master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value.' "

"From our examination of the evidence, we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin—that the amount thus allowed in item 1 for lands, yards, and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent was allowed in item 30 for 'engineering, superintendence, legal expenses,' and again was included in the total on which 5 per cent was allowed in item
72 37 for 'contingencies,' and, in addition, was included in the total on which 10 per cent was allowed in item 39 for 'interest during construction.' " (P. 450.)

The fundamental objections to the application of the theory of reproduction to railway lands are thus stated by the court:

"These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessi-

ties. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded." (Pp. 450-451.)

The manner in which the "railway value" was found has been stated. It was based on a consideration of the market value
73 in the usual acceptance of the word, to which was added what it was estimated it would cost the railroad to acquire the land, and the sum was multiplied by three, in the case of agricultural lands, so as to cover improvements which might be on the land and the consequential and severance damages, and the cost of acquisition. Then the court states the usual rules of damages upon condemnation of lands:

"* * * supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its fair market value for all its available uses and purposes. * * * If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. * * * But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. * * * The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership. * * * There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained." (Pp. 451-452.)

The court then points out what must be assumed in an attempt to estimate the cost of reproduction of lands:

74 "Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right-of-way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent on its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty.

But it does not justify the acceptance of results which depend upon mere conjecture." (P. 452.)

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers
75 —men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right-of-way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimate before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided." (P. 453.)

What is "the substantial question to be decided"?

"That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similiarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional
76 and void because they do not permit a return upon an increment so calculated?" (Pp. 453, 454.)

After a short examination of the nature of public service property the court answers its own query:

"* * * And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can
77 not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right-of-way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'

"By reason of the nature of the estimates, and the points to which the testimony was addressed, the amount of the fair value of the company's land can not be satisfactorily determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive." (Pp. 454-456.)

It is contended that the Minnesota Rate Cases decision is inapplicable here because what was condemned in that case was the particular method there employed to show the cost of reproduction of land, and not what is here suggested by the carrier's witnesses as possible. It is urged that in the Minnesota Cases the market value of the railroad lands was not shown. What was condemned was the theory that the cost of reproducing the lands occupied by a
78 railroad can be determined by a process of assuming a "railway value" estimated in multiples of the present fair average value of similar lands in the vicinity, and the condemnation of the court was upon the ground that impossible and contradictory assumptions must necessarily be the basis for the attempt to ascertain the present cost of a railroad's lands. We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court as beyond the possibility of rational determination; nor is there any

essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

The decision in the Minnesota Cases has since been generally accepted by courts and commissions as settling the disputed question whether the cost of reproduction theory could be made to apply to lands of a railway. See Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35, 42; Chicago & N. W. Ry. Co. v. Smith, 210 Fed. 632; Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

In the Denver Water Case in the United States district court for the District of Colorado, to enjoin the enforcement of rates filed by authority of law, the special master reported, inter alia, the value of the utility's lands. He said:

79 "The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. Minnesota Rate Cases, 230 U. S. 352, at 449-456. It follows from this rule that the original cost of the lands is not necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance damages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question in my judment, always is, What is the present market value of similar lands in the same locality and not what are these lands worth now to the water company for the purposes for which they are now used?"

The utility excepted "because the master erred, as a matter of law, in refusing to consider, in determining the fair value of the lands, anything on account of the actual or estimated consequential or severance damages," and because he "erred in refusing to consider,

80 in connection with the determination of the fair value of the lands, or to include therein, anything whatever on account of overhead expenses," claimed to be at least 10 per cent of the value of the lands for ordinary purposes. These exceptions were stricken by the district court. On appeal and cross appeal to the United States Supreme Court, that court treated as established the

propriety of estimating the utility's property on the basis of present market values as to lands, and said that the method was fairly applied by the special master and was hardly disputed by the appellants, except as to certain matters other than his treatment of land. Denver v. Denver Union Water Co., 246 U. S. 178.

The use of multiples in ascertaining the cost of reproduction of lands embraced in railroad rights of way was discontinued by the Washington and California commissions, reversing their former practice and their earlier decisions. Public Service Comm. v. Seattle, Renton & S. R. Co., 4 Wash. Pub. Serv. Com. Ann. Rep. (1914), 132, 134; In re Value of Quincy Western Ry. Co., 8 Cal. R. R. Com. Dec. 340. This interpretation of the Minnesota Cases has been accepted as to telephone rights of way by the Colorado and Washington Commissions. Re Mountain States Teleph. & Teleg. Co., Colo. Pub. Util. Comm., P. U. R., 1917, B. 198, 265; Public Service Comm. v. Pacific Teleph. & Teleg. Co., Wash. Pub. Serv. Comm., P. U. R., 1916, D. 947, 54 A. T. & T. Co. Com. L., 171, 174. Certain other state commissions have never used multiples for the purpose of determining the cost of reproduction of lands. Re Illinois Terminal Ry. Co., 4 Ill., P. U. Com. Rep. 263, 266; Re Portland Ry. L. & P. Co., Oreg. Pub. Serv. Comm., P. U. R., 1916, D., 976, 1022.

81 Not alone do the uncertainties which we have referred to surround what would be the conditions of ownership, of improvement, and of value of near-by property, and of general industrial development, but there can be no certainty as to what land would have to be acquired at a cost to the carriers upon reproduction or a present acquisition. The carrier has been constructed within comparatively a recent period of time; nothing in the record shows us that the reproduction of the road would be regarded in any less friendly spirit by the community as a whole and individual owners in particular, than when the right of way and terminals in question were acquired but a few years back. As appears elsewhere in this report, of approximately 1,933,065 acres of carrier lands, 511,008 acres were acquired by the carrier through aids, gifts, grants of right of way, and donations.

Of the total original cost of the carrier lands, approximately 40 per cent was donated by citizens of various communities along the line. That all such donated lands would necessarily have to be bought or condemned and paid for at the full amount which a jury would award on condemnation is an assumption we do not feel warranted in making from the record before us. Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto.

82 EXHIBIT B.

Before the Interstate Commerce Commission.

Valuation Docket No. 4.

In the Matter of the Valuation of the Property of The Kansas City Southern Railway Company et al.

Affidavit.

STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore and J. M. Souby, each being first duly sworn, upon his oath says:

Following the service upon the Carrier by the Interstate Commerce Commission of the tentative valuation of its property in November, 1916, we both entered upon active charge of the case as attorneys for the Carrier and after the preparation and filing of the protest against the tentative valuation proceeded in the collection and preparation of evidence regarded by us as necessary to sustain the allegations of fact made in the protest. Among other things we deemed it advisable to have evidence as to the cost of acquiring the lands of the Carrier by purchase or condemnation at valuation date. Upon taking charge of the case, we had learned that an appraisement had previously been made on behalf of the Carrier of its entire right of way and other lands on the basis followed by the Bureau of Valuation, designed to serve as a check upon the similar work of the Bureau; that is, there had already been made an appraisement
83 of the fair market value on valuation date of the naked land adjoining and adjacent to the lands of the Carrier and regarded by the particular appraiser as of similar character and of about the same average value as the Carrier's lands, such appraisal having been made as to each county separately by an experienced real estate man employed in each county for that purpose. No appraisal had been made, however, of the cost of acquiring the Carrier's lands by purchase or condemnation as provided by the Valuation Act. Accordingly, before the first assignment of this case by the Commission for the taking of testimony generally, we made arrangements in March, 1917, for the making of such appraisement of the Carrier's lands in Kansas City and Jackson County, Missouri, and this work was undertaken and carried out immediately by Mr. Frank McMillan. On March 6, 1917, at Kansas City, it was agreed with the Director of Valuation that the Carrier would not be expected to present this class of testimony at the hearing before the Commission then set for March 19, 1917, as appears from letter signed by S. W. Moore and Pierce Butler dated March 7, 1917, and addressed to the Director, hereto attached and marked Exhibit "A" and the Director's

reply thereto dated March 9th, 1917, hereto attached marked Exhibit "B."

Before similar arrangements had been made for carrying out this work on the balance of the line, we both attended the general hearing in Washington in the several consolidated cases, beginning March 19th, 1917, at which evidence was taken upon this subject of the cost of acquiring railroad lands. In view of the admissions made by the Director of Valuation at that hearing (see printed transcript of testimony, pages 672 and 673) to the effect that the use of a
84 multiplier to determine cost of acquisition of lands in excess of the naked value of adjoining lands was feasible, we felt that there was every possibility of our being able to reach an agreement with the Bureau of Valuation with respect to this matter, which would entirely obviate the necessity of taking testimony thereon, and accordingly decided to defer undertaking the contemplated appraisements of the Carrier's lands south of Jackson County, Missouri, until such time as we found it impossible to make such agreement.

Upon our return from Washington we began negotiations with the representatives of the Bureau of Valuation at Kansas City with respect to various other matters put in issue by our protest, in an effort to reach an agreement with respect thereto which would eliminate the necessity of covering the same by testimony. In the meantime this case was set down for the hearing of testimony at Kansas City on May 23, 1917. In a letter of May 12th, 1917, however, the Director advised that the case might be continued, but he would come on to Kansas City in any event, arriving on May 22, 1917, the purpose of such visit being as he expressed it, in his letter of May 18th, 1917, "to look over matters with you and possibly reach some agreement as to some disputed issues." Such a visit for this purpose had already been promised by the Director in an earlier letter, dated April 24, 1917, which is attached hereto, marked Exhibit "C." By order of the Commission entered May 19th, 1917, the hearing was continued indefinitely, a letter from the Director dated May 18, 1917, stating that such an order would be entered on account of the fact that the hearing in the Texas Midland case was still going on.

85 At a conference with the Director beginning on May 22, or May 23, 1917, an agreement was reached with respect to the matter of ascertaining the cost of acquiring lands by purchase or condemnation identical with or substantially identical with that finally employed in the stipulation which has been filed in this case (our Abstract, pp. 969-970), as follows, to-wit:

"Cost of Condemnation and Damages in Excess of Present Value. The Carrier insists that the cost of acquiring its right of way and other lands, as of valuation date, upon the basis of the then land values, may be shown by two methods: first, by taking each individual parcel and showing what it would cost to acquire it or a right of way across it, by purchase or condemnation; secondly, by ascertaining a percentage or multiplier which should be applied to the acreage or naked land value as of valuation date, such percentage or

multiplier to be ascertained for the whole line or for particular sections of line as might be necessary.

"It is agreed by the Carrier and the Division of Valuation that the first method would be tedious and expensive and ought not to be resorted to if the second method can be made available.

"It is, therefore, understood that the Division of Valuation will recommend to the Commission that if it decides that evidence upon the question of the cost of acquiring land by purchase or condemnation shall be received by the Commission with a view to reporting that fact to Congress, or including that element in the final valuation of the Carrier's properties, then the Division of Valuation shall investigate and report to the Commission the amount of such multiplier or percentage and where applicable. When so reported by the Division of Valuation, the Carrier shall have the same right to object to the same and introduce testimony in modification
86 of the same which it has to any other fact stated in the Tentative Valuation.

"If, in the opinion of the Commission, it transpires, at any state of the proceedings, that evidence of the multiplier cannot be legally received and the multiplier legally used for the purpose of showing the cost of acquisition by purchase or condemnation then the Carrier shall not be by this agreement in any way limited as to its right to introduce evidence tending to show cost of acquiring individual parcels in accordance with the first method above described."

In reliance upon the agreement then reached, we regarded it as wholly unnecessary and consequently as involving an unnecessary expense to proceed further with the preparation of testimony of any character relating to this question. The whole matter was allowed to rest until the service upon the company of notice on August 29th, 1918, that the stipulation in certain respects was not approved by the Commission and that a hearing would be held at Kansas City September 9, 1918, for the purpose of giving the Carrier an opportunity to offer evidence on all questions left open by the stipulation and affected by the Commission's failure to adopt the same.

At the time of the service upon the Carrier of this notice of hearing for September 9, 1918, Mr. Moore having severed all connection with the Carrier and occupying the position of General Solicitor to the Federal Manager of the Carrier's properties, had likewise for the time being ceased to participate as a representative of the Carrier in this case. It was not until about September 7th, 1918, that he received notice that Judge Payne, at the request of the General Counsel of the Company, had assented to his further participation
87 in the case as counsel for the Carrier.

Mr. Souby, who was still representing the Carrier in the case, was absent from the city and had no knowledge of the hearing until his return on September 3, 1918. Shortly after his return and some three or four days prior to the date fixed for the hearing, he held a conference with the Valuation Attorney, Mr. C. F. Newman, with respect to the character of evidence which he intended to offer on behalf of the Carrier. When the matter of testimony with respect to the question of the cost of acquiring lands at date of valua-

tion by purchase or condemnation was discussed, Mr. Newman stated that it was his intention to object to the introduction of any such evidence because as he understood the effect of the Commission's decision in the Texas Midland case, such evidence would not be considered by the Commission. Mr. Souby, feeling confident that such an objection made by the representatives of the Bureau of Valuation would in all probability be sustained by the Examiner, decided that it would be fully sufficient for the protection of the Carrier to make an offer of same with respect only to Jackson County, and the record of the hearing shows that such was done. The action of the Examiner in sustaining the objection to this character of testimony was in effect overruled by the Commission when it set the case for hearing on October 7, 1918, for the sole purpose of taking evidence with respect to this question. The notice of the last mentioned hearing was received by the Carrier's representatives at Kansas City on Friday, October 4th, 1918, but one week day intervening between the date of the notice and the date fixed for the hearing.

88 If it had appeared at the time of the receipt by Mr. Souby of the notice of the hearing fixed for September 9th, 1918, that testimony of the character here under consideration would be received by the Examiner, there would have been time intervening between such date and the date of the hearing and the time which would be consumed in introducing the testimony which the Carrier was already prepared to offer, to enable it to make a beginning in the preparation of testimony with respect to the cost of acquiring its lands south of Jackson County, Missouri, although such testimony would of necessity have been hastily prepared and therefore not entirely satisfactory. There was not time, however, after receipt of notice of hearing set for October 7, 1918, to make any sort of preparation for such testimony and have it available for introduction in evidence at the hearing fixed for that date, and accordingly we did not undertake to have such appraisement started, but undertook instead to secure some agreement with the representatives of the Bureau of Valuation and with the Commission which would enable us to secure and offer same.

The notice that hearing would be had at Kansas City on October 7, 1918, was received in the form of a telegram from Commissioner B. H. Meyer, addressed to Mr. Souby, dated October 3rd and received here October 4th. On October 5th the following telegram, signed by Mr. Souby, was sent to Commissioner Meyer:

"Your telegram third instant re Kansas City Southern Valuation. When testimony was taken here Sept. ninth there was an advance understanding that our evidence as to cost of acquisition of lands would be excluded in view of Commission's ruling in Texas Midland

89 case and that our contention would be preserved by offers of testimony, and this was done. Stop. Legal evidence of the cost of acquisition by purchase or condemnation should I suppose in the absence of some agreement to the contrary, be directed to each parcel or tract of land and this data we had assembled for Kansas City and Jackson County when the stipulation pages nine sixty nine and nine seventy of our abstract was made

which rendered unnecessary the assembling of similar data at other points on the line. We are prepared to introduce all the testimony that we have at the hearing beginning here next Monday, but it is utterly impossible to secure similar data on some seven hundred miles south of Jackson county in time for hearing now set for October seventeenth. Will not the Commission in view of this situation consent that outside of Kansas City and Jackson County we may introduce testimony showing cost of acquisition by the percentages or multiples over normal land values, without making a separate problem of each tract or parcel."

On October 7th the taking of testimony began before Examiner Kimball at Kansas City and we proceeded to introduce our testimony with respect to the cost of acquisition by purchase or condemnation of the lands of the Carrier at valuation date in Jackson County, Missouri, including Kansas City, which, as above stated, had been previously prepared. We frankly stated to the Examiner and to Mr. Benton and Mr. Newman, counsel for the Bureau of Valuation, that we were not prepared to introduce testimony except as to Jackson County, Missouri, for the reason, as above stated, that the necessary data had not been assembled and the witnesses had not been qualified, because reliance had been placed upon the stipulation.

90 No answer having been received from Commissioner Meyer to our telegram of October 5, 1918, we had a conference with Messrs. Kimball, Benton and Newman on October 8th, giving them a copy of our telegram to Commissioner Meyer of October 5th above quoted, and we suggested that arrangement be made by which time might be given us within which to qualify our witnesses upon the subject of the cost of acquisition of the Carrier's lands by purchase or condemnation, south of Jackson County, Missouri. After a full discussion of the matter, the gentlemen named, on October 8th, sent the following telegram to Commissioner Meyer:

"Situation is that Carrier is now introducing evidence in tabular form showing original cost and value at time of acquisition of all lands Jackson County including Kansas City. Carrier not in position to introduce like testimony for balance of line but if we proceed now must introduce oral evidence showing value at time of acquisition for each parcel of entire line (which will perhaps take two or three weeks) Souby proposes to adjourn hearing submitting whole matter to Commission on seventeenth Period. If Commission decides to take further testimony Carrier will at subsequent date be prepared to introduce it in tabular form for any or all counties.

Souby ready to make agreement as follows which Benton and Newman recommend.

Evidence Kansas City and Jackson County to be taken Carrier claims evidence typical in principle of all counties Bureau does not admit it is typical and reserves right on order of Commission to take evidence covering counties claimed to be typical Case to be argued seventeenth before Commission all questions Period. After argument Commission to decide before report whether evidence covering any or all other counties shall be taken Carrier agrees that if

91 Commission determines to apply multiple comma the multiple two may be applied outside cities in all other counties without taking further evidence except as Commission may take typical counties upon request Bureau Period. If evidence taken after argument neither party to claim oral argument before Commission but may file brief or make oral argument before Examiner Thereupon Commission may render decision upon all issues raised by protest period. Souby's agreement is subject to approval Untermyer now requested by wire Untermyer to advise Commission direct."

The foregoing telegram came to our notice October 9th, and a telegram was immediately sent to Samuel Untermyer, General Counsel of the company at New York City, asking for authority to join in proposed agreement. The requested authority was duly received, and accordingly a telegram to that effect was sent to Commissioner Meyer on October 9th, as follows:

"Suggestion wired you yesterday by Kimball, Benton and Newman is satisfactory to Mr. Untermyer, Souby and myself, with understanding that if Commission determines to ascertain and report cost of acquisition of lands by purchase or condemnation such data shall be ascertained for entire line by taking of testimony or agreement upon multiple."

No reply to either telegrams has been received from Commissioner Meyer.

When we had concluded the introduction of testimony as to Jackson County, on October 10th, 1918, as aforesaid, we asked the Examiner to adjourn the hearing until witnesses could be prepared to testify as to lands south of Jackson County. There was an

92 extended conference upon this subject. We explained at length that the testimony was not then available, for reasons heretofore stated, but that we would proceed with all speed to make it presently available. We produced before the Examiner Mr. J. L. Faris, who, with Mr. Edwin (who was likewise in the city and available) were familiar with the lands of the Carrier covering its entire line from Jackson County south to the Gulf, having made a joint appraisement of said lands with Mr. Minor, representing the Bureau of Valuation. Mr. Faris stated that he was prepared to leave Kansas City at once and make the necessary examination of lands in Cass County, Missouri, and return the following Monday, October 14th, and testify in reference thereto, returning immediately to qualify himself to testify with reference to the lands in the next county south and so on, and we offered to send out Mr. Edwin immediately, so that he could likewise qualify himself and return to Kansas City to give his testimony, so that the taking of testimony beginning October 14th might proceed continuously until completed, except for the time during which Mr. Souby and Mr. Moore would necessarily be absent in Washington to attend the argument of the case set for October 17th. The Examiner refused to permit any continuance or adjournment whatsoever, or to afford us any opportunity whatsoever to produce our testimony, and closed the hearing against our strong protest.

On the same day, October 10th, we sent the following telegram to Commissioner Meyer:

"Kansas City Southern Valuation. We have completed today all testimony now available, which includes cost of acquisition by purchase or condemnation of lands in Jackson County, Mo., in-
93 cluding Kansas City. We did not assemble data and qualify witnesses to give similar testimony outside of Jackson County because we relied on the stipulation set forth in our abstract pages nine sixty nine and nine seventy. We can make a beginning on this testimony next Monday, continuing until same is completed, except during period when we are necessarily absent to attend Washington hearing now set for October 17th. Examiner Kimball acting on instructions declines to adjourn hearing until next Monday so this program may be carried out. We should be permitted to introduce this testimony. The delay is no fault of ours. Will not Commission authorize examiner to hear it? Will greatly appreciate telegraphic reply."

On October 12th the following telegram was received from Commissioner Meyer, which was the only direct answer to our telegrams above quoted:

"Instructions have been wired to the examiner."

We immediately called up Mr. Newman, Valuation Attorney, to find out the meaning of the telegram, and he explained that instructions had been received to read into the record Mr. Untermyer's motion for the taking of testimony, which, as Mr. Newman advised me, had already been done. He also stated that the examiner had left Kansas City before the telegram had been received.

S. W. MOORE.
J. M. SOUBY.

Subscribed and sworn to before me this 17th day of October, 1918.

ALFRED HOLMEAD,
Notary Public.

94 Supreme Court of the District of Columbia.

At Law. 61/917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Order.

Upon the annexed petition of Kansas City Southern Railway Company, verified by its secretary, G. C. Hand, on the 3rd day of December, 1918,

It is ordered that the above-named respondent, Interstate Commerce Commission of the United States, show cause at a session of

this Court, to be held in the court house of the Supreme Court of the District of Columbia in the City of Washington, on the 10th day of December, 1918, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting a peremptory writ of mandamus requiring the respondent to investigate, take and receive testimony, including such competent proof that relator may offer, and ascertain, find and report in detail the present cost of condemnation and damages or of
95 purchase in excess of original cost or present value of lands owned or used by relator, in conformity with the provisions of the Act of Congress of March 1, 1913.

And respondent is further required to show cause at said time and place why, in case this Court shall refuse such peremptory writ, an order should not be granted directing that an alternative writ issue requiring and directing said respondent to perform the aforesaid acts in compliance with said Act of Congress, or to show cause before this Court, at such time as may be fixed by this Court, why a peremptory writ of mandamus should not issue to that effect.

Sufficient reason appearing therefor, let service of this order and the papers upon which it is granted, on the respondent, on or before the 6th day of December, 1918, be deemed sufficient.

Dated, Washington, D. C., December 5th, 1918.

WALTER I. McCOY,
Chief Justice of the Supreme Court of the District of Columbia.

96-282 Filed Dec. 24, 1918.

(Copy.)

In the Supreme Court of the District of Columbia.

No. 61917.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Answer of Interstate Commerce Commission to Amended Petition.

Respondent hereby makes its answer to the original petition its answer to the amended petition, in the above-entitled proceeding.

For the convenience of the Court and of counsel, respondent attaches hereto, marked Exhibit A, a copy of respondent's decision in the Texas Midland Railroad Valuation Case 1 I. C. C. Val. Rep. 1, and calls particular attention to pages 52 to 62, inclusive, and pages

168 to 172, inclusive, thereof, where the subject matter involved in this proceeding is discussed.

P. J. FARRELL,
For Respondent.

December 24, 1918.

* * * * * * *

283 Filed January 2, 1919.

Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Demurrer to Answer.

Comes now the relator, The Kansas City Southern Railway Company and demurs to the answer of the respondent, and says that the same is not good in law, because:

I. The Act of March 1, 1913, imposes upon the respondent the plain ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by the relator.

II. The said Act imposes upon the respondent the plain ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by the relator for the purpose of establishing such present cost of condemnation or purchase.

284 III. The answer of respondent fails to set forth any legal excuse for failing to perform said ministerial duties.

Wherefore, relator prays that this Court let its writ of mandamus go as prayed in the petition.

Respectfully submitted.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By SAMUEL UNTERMYER,
JESSE C. ADKINS,
Its Attorneys, 705 Wilkins Building, Washington, D. C.

F. M. S.

285 Supreme Court of the District of Columbia.

Thursday, March 6, 1919.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause and answer thereto, the amended petition and demurrer to said answer and after argument thereon by counsel of record for the respective parties, was submitted to the Court. Upon consideration whereof, it is this 6th day of March, A. D., 1919, ordered that said demurrer be, and the same is hereby overruled. Thereupon, petitioner elects to stand upon said demurrer; whereupon it is considered that said rule to show cause be, and the same is hereby discharged, the petition dismissed and that respondent recover of the petitioner his costs of defense to be taxed by the Clerk and have execution thereof.

From the foregoing judgment the petitioner by its attorney of record, Mr. Frank M. Swacker, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars ($100.00), with leave to deposit the sum of Fifty Dollars ($50.00) with the Clerk in lieu thereof.

Memorandum.

March 6, 1919.—$50 deposited with Clerk in lieu of appeal bond.

286 Filed March 6, 1919.

In the Supreme Court of the District of Columbia.

At Law.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Assignments of Error.

The Court below erred as follows:

1. In overruling the demurrer to the answer.

2. In declining to issue the writ of mandamus as prayed in the petition.

3. In not holding *the* the Act of March 1, 1913, known as the Valuation Act imposes upon the respondent the plain ministerial duty to

investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by the relator.

4. In not holding that the said Act imposes upon the respondent the plain ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by the relator for the purpose of establishing such present cost of condemnation or purchase.

FRANK. M. SWACKER,
Attorney for Petitioner.

287 Filed March 6, 1919.

In the Supreme Court of the District of Columbia.

At Law. 61917.

UNITED STATES OF AMERICA at the Relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Designation for Record.

To the Clerk of the Court:

You will please prepare the transcript for the Court of Appeals and include therein the following:

1. Original petition.
2. Amended petition.
3. Rule to show cause.
4. Answer to the original petition.
5. Answer to the amended petition.
6. Demurrer.
7. Order overruling the demurrer and entering final judgment and notice of appeal.
8. Notice that deposit for costs has been made.
9. Assignments of error.
10. This order.

FRANK M. SWACKER,
Attorney for Petitioner.

288 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 287, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 61917 at Law, wherein United States of America, at the relation of Kansas City Southern Railway Company, is Relator and Interstate Commerce Commission of the United States is Respondent, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of March, 1919.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Associated Clerk.

289 In the Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator,
against
INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Respondent.

Stipulation.

It is hereby stipulated by the attorneys of record for the parties in the above-entitled proceeding that the clerk of the Court of Appeals shall cause to be printed the entire record except Exhibit A of respondent's answer to amended petition, being pages 97 to 281 inclusive of the record herein (said Exhibit A being report of the Interstate Commerce Commission in the matter of the valuation of the Texas Midland Railway Company, 1 I. C. C. Valuation Report 1).

FRANK M. SWACKER,
Attorney for Appellant.
P. J. FARRELL,
Attorney for Appellee.

Washington, D. C. March 7, 1919.

[Endorsed:] No. 3255. U. S. ex rel. Kansas City Southern Railway Co., Appellant, v. Interstate Commerce Commission. Stipulation as to Printing Record. Court of Appeals District of Columbia. Filed Mar. 7, 1919. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3255. United States of America at the relation of Kansas City Southern Railway Company, appellant, vs. Interstate Commerce Commission of the United States. Court of Appeals, District of Columbia. Filed Mar. 6, 1919. Henry W. Hodges, clerk.

April Term, 1919.

TUESDAY, May 6th, A. D. 1919.

* * * * * * *

No. 3255.

U. S. ex Rel. KANSAS CITY SOUTHERN RAILWAY CO., Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

It is stipulated that the above entitled cause may be heard and determined by the Chief Justice and Mr. Justice Robb, in the absence of Mr. Justice Van Orsdel.

Samuel Untermyer, F. M. Swacker, S. W. Moore, Counsel for Appellant.

P. J. Farrell, Counsel for Appellee.

(Endorsed:) No. 3255. Stipulation of Counsel. Court of Appeals, District of Columbia. Filed May 6, 1919. Henry W. Hodges, Clerk.

TUESDAY, May 6th, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

On motion, the appellant is allowed to file a supplemental brief herein.

The argument in the above entitled cause was commenced by Mr. S. W. Moore, attorney for the appellant, and was concluded by Mr. P. J. Farrell, attorney for the appellee.

April Term, 1919.

MONDAY, June 2nd, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, the Court being equally divided in opinion, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SMYTH.

June 2, 1919.

Mr. Justice Van Orsdel did not sit or take any part in this decision.

In the Court of Appeals of the District of Columbia.

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Appellee.

Now comes the appellant Kansas City Southern Railway Company and moves the Court for a writ of error to remove the above-entitled cause to the Supreme Court of the United States, and that the amount of bond for costs be fixed.

FRANK M. SWACKER,
Attorney for Appellant.

(Endorsed:) No. 3255. United States of America at the Relation of Kansas City Southern Railway Company, Appellant, against Interstate Commerce Commission of the United States. Motion for writ of error. Court of Appeals, District of Columbia. Filed Jun- 3, 1919. Henry W. Hodges, Clerk.

WEDNESDAY, June 4th, A. D. 1919.

* * * * * * *

No. 3255.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said writ issue as prayed, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before

you, or some of you, between United States of America at the Relation of Kansas City Southern Railway Company, Appellant, and Interstate Commerce Commission of the United States, Appellee, a manifest error hath happened, to the great damage of the said Appellant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

—— ——.

In the Supreme Court of the United States.

UNITED STATES OF AMERICA at the Relation of KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff-in-Error,

against

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES, Defendant-in-Error.

Assignment of Errors.

In Error to the Court of Appeals of the District of Columbia.

Comes now the plaintiff-in-error in the above-entitled cause, by Frank M. Swacker, its attorney, and says that, in the record, proceedings, decision and final judgment of the Court of Appeals of the District of Columbia, in the above-entitled cause, which was instituted by the plaintiff-in-error in the Supreme Court of the District of Columbia and brought by it to the said Court of Appeals by appeal, there is manifest error to the prejudice of this plaintiff-in-error in this, to wit:

First. That the said Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of

Columbia and in effect sustaining its order dismissing with costs the petition of plaintiff-in-error for a writ of mandamus to the said Interstate Commerce Commission to require it to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff-in-error, as required by the Act of Congress of March 1, 1913, imposing said duty upon defendant-in-error.

Second. Said Court of Appeals erred in sustaining the Supreme Court of the District of Columbia in overruling the demurrer of the relator to the answer of the respondent to the petition of relator praying said court to issue its writ of mandamus to respondent to require it to comply with the provisions of said Act of Congress March 1, 1913, commonly known as the Valuation Act.

Third. That said Court of Appeals erred in construing said Act of Congress of March 1, 1913, known as the Valuation Act, in failing to find that said Act imposed upon defendant-in-error the ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff-in-error.

Fourth. That said Court of Appeals erred in construing said Act of March 1, 1913, known as the Valuation Act, in failing to find that said Act imposes upon the defendant-in-error the ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by plaintiff-in-error for the purpose of establishing such present cost of condemnation or purchase.

Fifth. That said Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and directing it to issue its writ of mandamus as prayed in the petition.

Wherefore, for these and other manifest errors appearing in the record, the plaintiff-in-error prays that the judgment of the Court of Appeals of the District of Columbia be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff-in-error herein directing the Supreme Court of the District of Columbia to issue its writ of mandamus as prayed in the petition of relator in said Court.

FRANK M. SWACKER,
Attorney for Plaintiff-in-Error,
Wilkins Building, Washington, D. C.

Dated Washington, D. C., June 9, 1919.

(Endorsed:) United States of America at the relation of Kansas City Southern Railway Company, Plaintiff-in-Error, against Interstate Commerce Commission of the United States, Defendant-in-Error. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jun- 12, 1919. Henry W. Hodges, Clerk.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Kansas City Southern Railway Company, as principal, and Royal Indemnity Company, a corporation of the State of New York, with Head Office at #84 William St., New York City, N. Y., as surety, are held and firmly bound unto Interstate Commerce Commission of the United States in the full and just sum of three hundred — to be paid to the said Interstate Commerce Commission or its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, jointly and severally, by these presents. Sealed with our seals and dated this Eleventh day of June, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between United States of America, at the relation of Kansas City Southern Railway Company, Appellant, against Interstate Commerce Commission of the United States, Appellee, a judgment was rendered against the said Kansas City Southern Railway Company, and the said appellant, Kansas City Southern Railway Company, having obtained a writ of error, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Interstate Commerce Commission, appellee, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said appellant shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE KANSAS CITY SOUTHERN RAILWAY CO.,
By G. C. HAND,
Vice President.

[SEAL OF K. C. S. R. CO.]

ROYAL INDEMNITY COMPANY,
By JOHN F. A. BECKER,
Attorney-in-Fact.

[SEAL OF ROYAL INDEMNITY COMPANY.]

Approved by—
C. J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3255. U. S. ex rel. Kansas City Southern Railway Co., Appellant, vs. Interstate Commerce Commission of the United States. Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Jun- 12, 1919. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the Interstate Commerce Commission of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein United States of America at the relation of Kansas City Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of June, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged June 13, 1919.
P. J. FARRELL,
Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-13, 1919. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 69 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of the United States of America at the relation of Kansas City Southern Railway Company, Appellant, vs. Interstate Commerce Commission of the United States, No. 3255, April Term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 13th day of June, A. D. 1919.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27,168. District of Columbia Court of Appeals. Term No. 413. The United States of America at the relation of Kansas City Southern Railway Company, plaintiff in error, vs. Interstate Commerce Commission. Filed June 16th, 1919. File No. 27,168.